31

Office - Supreme Court, U. S.
FILED
NOV 4 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 685.

WEST VIRGINIA POWER COMPANY, a corporation, and NORFOLK & WESTERN RAILWAY COMPANY, a corporation,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

RAYMOND T. JACKSON,
Cleveland, Ohio;

JESSE KNIGHT,
J. P. VAN DE VOORT,
New York, N. Y.;

ERNEST K. JAMES,
Charleston, W. Va.;

JOSEPH M. SANDERS,
Bluefield, W. Va.,
Attorneys for Petitioners.

Dated: November 3, 1941.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

Table of Cases.

	PAGE
Oklahoma v. *Atkinson Co.*, 312 U. S. ....., 85 L. Ed. 977, 61 S. Ct. 1050	6
Ryan v. *Chicago B. & Q. R. R. Co.*, (C. C. A. 7th), 59 F. (2d) 137	6
United States v. *Arizona*, 295 U. S. 174	6
United States v. *West Virginia Power Co.*, (C. C. A. 4th), 91 F. (2d) 611, 302 U. S. 770	5

Statutes.

Act of June 22, 1936, 49 Stat. 1570	4
Act of June 28, 1938, 52 Stat. 1215	4
Emergency Relief Appropriation Act of 1935	5
National Industrial Recovery Act of 1933	5

Miscellaneous Authorities.

Executive Order No. 7183A of September 12, 1935	4, 5
H. D. 91, 74th Cong., 1st Sess.	1, 2, 3
H. D. 306, 74th Cong., 1st Sess.	2, 4

IN THE

Supreme Court of the United States

OCTOBER TERM 1941.

No. 685.

WEST VIRGINIA POWER COMPANY, a Corporation, and
NORFOLK & WESTERN RAILWAY COMPANY, a Corporation,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

REPLY BRIEF FOR PETITIONERS.

This brief is confined to a summary reply to certain statements and contentions of the respondent.

1. Respondent asserts that some indeterminable portion of the power storage in the Bluestone Statutory Scheme "*could* be made available for additional flood control by drawing down the level of the power pool when reports predict a flood of magnitude requiring increased storage space" (Resp. Br., p. 3).* Even this artfully worded statement, wholly unsupported and unsupportable by any citation to H. D. 91 or any other report, does not pretend that under the Bluestone Statutory Scheme this *is*

* Unless otherwise indicated, all italics herein are supplied.

intended to be or *would* be done. In fact the reports of the Engineers show not only that (except during a period of low water when there may have been draw-down for power purposes) the power storage is to be kept *full* (elevation 1490), but that it is even contemplated to encroach upon the flood control reservoir by impounding water for power purposes up to elevation 1500. The report says that "*if above 1490* when reports predicted a flood of magnitude", sufficient water will be released merely to draw the water "*down* to elevation 1490" (the top of the power reservoir), which will make "available for flood storage the full portion of the reservoir allotted to flood control" but none of the power storage (H. D. 91, p. 115, par. 62-3). Respondent's assertion amounts merely to a claim that it might be theoretically possible (although actually not contemplated) to manipulate the power reservoir so as to offset to a very limited and undependable extent a small part of the damage inflicted upon flood control by utilization of the major part of the site for the power project. This is a far cry from showing that the power project is incidental to, or in aid of, the flood control project or of flood control. See Petition and Supporting Brief, 11-12, 31-32.*

2. Respondent asserts that the "dead storage will provide a head for the generation of power *and* space for silt accumulation" (Resp. Br., p. 4). The latter half of this assertion too is wholly unsupported and unsupportable by citation to H. D. 91 or any other report; and respondent wholly ignores the fact that both H. D. 91 and H. D. 306 inescapably establish that there is no silting problem and that dead storage at this project is neither needed, nor useful, nor intended for silt accumulation, but solely for power development—as is patent from the showing in Pet. 26-27.

---

* Hereinafter, references to either the Petition or the Supporting Brief are designated merely as "Pet.....".

3. Respondent cryptically asserts that the incidental increase of the low water flow resulting from the operation of the power project "will provide a regulated stream flow in times of low water" (Resp. Br. 3-4). Respondent wholly fails to face the undisputed facts that, as shown at Pet. 27-28, such increase in low water flow as may incidentally result from the operation of the power project will be of *no benefit to navigation* and hence will not promote any constitutional function.

4. Respondent asserts that the "project is designed to reduce below bankful stage all floods which have occurred since 1896" (Resp. Br. 4). However, the Engineering Reports state that the Bluestone Reservoir, even if it were devoted solely to flood control, "cannot be depended upon to control the Kanawha River's discharge within its banks", for the reason, among others, that "the proposed reservoir has not sufficient capacity to retain maximum run-offs that *have occurred*"; also that "in 1897 and 1899 the Bluestone Reservoir would not have brought the flood within the banks of the Kanawha River" (H. D. 91, p. 118, pars. 70, 71; p. 106, par. 32). Respondent points to the annual benefits of $370,000 estimated to result from the flood-control project and to the expected returns from the power project of the Statutory Scheme (Resp. Br. 4), but leaves unstated that such flood-benefits are only one-half of the $740,000 which, according to the same Army Engineers, would result had not the major part of Bluestone Reservoir been diverted to the power project, with corresponding sacrifice of flood-control benefit (H. D. 91, p. 94, par. 4(a); Pet. 2-3).

5. Respondent fails to meet the issue as to the authority of Congress to authorize power projects and instead urges the importance of the flood problem and of flood

control (Resp. Br. 4-5). But there is no issue here either as to the importance of the flood-control problem or as to the authority of Congress to construct flood-control structures. Undoubtedly the Congress may refrain from utilizing for flood control all or a part of a site in order that the site or part thereof may be utilized for power production or, for that matter for farming, but the fact that utilization of part of the site for power production is *at the expense of flood-control benefits* establishes inescapably that such use is not the incidental result of or in aid of flood-control at the site.

6. Respondent implies that Congress by the Act of 1936 authorized the project "in accordance with the plans" in some report designated in that Act (Resp. Br. 6-7). This is plainly untrue as the only report mentioned by that Act in connection with this or any other part of the Ohio River Basin is H. D. 306, and no plans for the Bluestone project accompanied that report (Pet. 5). Moreover, the earlier condemnation proceeding (in which the court below in August, 1937, held that Executive Order No. 7183A had been ratified by the Act of 1936 so as to cure any illegal delegation of legislative power) was dismissed three months later on the Government's own motion while the landowner's petition for certiorari was pending in this Court. The present proceeding was not brought until the Executive Order had been approved by the Act of 1938. The only material question here is the effect of the Act of 1938, as shown in the instant petition and supporting brief (Pet. 9, 22).

7. Contrary to the statement of respondent (Resp. Br. 7), the court below in the earlier proceeding expressly refrained from deciding whether the Executive Order furnished any authority, independent of the 1936 Act, for condemning the lands, viz. whether the Acts of Congress

upon which the Executive Order expressly relied (Recovery Act and Relief Appropriation Act) were invalid, as unconstitutional delegations of legislative power. The court said "it is not necessary to decide this point here" (91 F. (2d) 611, 614).

8. Respondent asserts that, whether or not a Congressional authorization for federal officers to carry out a project "in accordance with the report of the Chief of Engineers *and* the plans and specifications submitted therewith" requires the federal officers to observe a condition imposed by such report, is not "a question of importance" (Resp. Br. 9). This contention is founded upon the claim that the pertinent Executive Order, and the statute adopting the provisions of that Order, have bearing only upon a single project. Viewed so narrowly, almost no decision of a circuit court of appeals, even though it be determinative of the most widely applicable principle of law, would be subject to review by this Court. Moreover, it is a matter of common knowledge (apparent from any examination of Rivers and Harbors Acts and similar Acts) that Congress frequently, if not invariably, authorizes projects individually and specifically. Indeed, specific designation by Congress is necessary to avoid unconstitutional delegation of legislative power. But it by no means follows that it is not a matter of general importance whether a Congressional authorization to construct a project in accordance with a report of the Chief of Engineers requires the officers to observe conditions specified in that report even though the particular authorization relates only to a single project. Plainly it is an important question of federal law whether under such an authorization the federal officers must comply with all or none or only some of the conditions imposed in that report in

accordance, and only in accordance, with which such officers are authorized to proceed (Pet. 9-10).

9. Respondent asserts, without supporting argument or reason, that the decision below is not in conflict with *Ryan* v. *C. B. & Q. R. R. Co.,* 59 F. (2d) 137, 143 or *United States* v. *Arizona,* 295 U. S. 174. The *Ryan* case laid down the principle that, where federal officers are authorized to condemn lands for a project *in accordance with plans and specifications* in a designated report, they are without authority to condemn lands for a project not in accordance with such plans and specifications. Plainly, any holding that, where federal officers are authorized to condemn lands for a project "*in accordance with a report* of the Chief of Engineers", such officers may disregard conditions imposed by that report, is in conflict with the principle applied in the *Ryan* case. That the decision of the court below is in conflict with the principle applied by this Court in the *Arizona* case is, we think, sufficiently shown in our supporting brief (Pet. 20-1).

10. Respondent baldly makes the categorical assertion that the facts in the instant case and in *Oklahoma* v. *Atkinson Co.,* 85 L. Ed. 977, "are similar in every material respect" (Resp. Br. 10). Yet respondent does not deny, and it can not deny, the undisputable facts reviewed in our supporting brief (Pet. 25-31) which show that the constitutional facts in the *Atkinson* case are precisely the opposite of those in the case at bar. Instead of supporting the lower court, the *Atkinson* case, as well as many other decisions of this Court cited in our supporting brief, plainly demonstrate the error of the decision of the lower court. In the *Atkinson* case, the creation of dead storage and of storage for low water regulation were plainly and clearly necessary for the provision of flood control and the improvement of

navigation, quite apart from the fact that they incidentally and necessarily created water power. In the instant case, however, there is a complete absence of any constitutional relation between the creation of the dead storage and the power storage for power development and any constitutional function of the United States.

Without going into further detail, we earnestly invite the attention of the Court to the fact that respondent, seeking to avoid the effect of the undisputed facts by resort to incomplete statements, erroneous and unsupported statements and bald disregard of material facts, has not attempted to dispose of various of petitioners' reasons and arguments for granting the petition nor to meet the important questions of law raised under the undisputed facts of this case.

Respectfully submitted,

Raymond T. Jackson

RAYMOND T. JACKSON,

Jesse Knight

JESSE KNIGHT,

J. P. VAN DE VOORT,

ERNEST K. JAMES,

Joseph M. Sanders

JOSEPH M. SANDERS,

Attorneys for Petitioners.

Dated: November 3, 1941.